IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 337 of 1992

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

BAROT DEVAJI ADAJI

Appearance:

1. Criminal Appeal No. 337 of 1992

MR BD DESAI, ADDL.PUBLIC PROSECUTOR for appellant

MR AN PATEL for Respondent

CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE M.H.KADRI

Date of decision: 03/03/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE J.M.PANCHAL)

Instant appeal filed under Section 378 of the Code of Criminal Procedure, 1973, is directed against judgment dated August 23, 1991, rendered by the learned Additional Sessions Judge, Banaskantha at Palanpur, in Sessions Case No.18 of 1988, by which the respondent is acquitted of the offence punishable under Section 17 and/or 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("the Act" for short).

2. Mr.Tukaram J.Thakur, who was then P.S.I. of Panthavada Police Station, was on patrolling duty, on September 2, 1987 along with police constables Amrut Manchand and Abbaskhan. While on patrolling duty, he had received an information that one Barot, dealing in opium, was to pass through Panthavada-Kuchavada road. Therefore, he had maintained a watch. At about 18.25 hours, a tractor coming from Dantivada road was spotted, which was stopped and it was found that a person, who was attired in rajasthani dress, was sitting in the trolley attached to the tractor. The person sitting in the trolley was made to alight and according to Mr.Thakur, the said person had disclosed his name to be Barot Devaji Adaji (i.e.the respondent), resident of village Satsan, Taluka : Dhanera. It was further found by P.S.I. Mr.Thakur that Barot Devaji Adaji was carrying a cotton bag. On opening the cotton bag, a bag of urea fertilizer was found, mouth of which was tied with twine. On opening the bag of urea fertilizer, it was found that it was containing sugar roughly weighing 5 Kgs. and there was also a polyethylene bag containing a paper-packet wherein semi-solid blackish coloured material was found. The substance contained in the paper-packet was ascertained to be opium and the respondent was called upon to produce pass or permit authorising him to possess the same. However, the respondent could not produce any such pass or permit. Thereafter P.S.I. Mr.Thakur had seized and sealed contraband item in presence of two panch witnesses, namely, Babuji Khemaji Mali and Patel Gokal Raghnath. P.S.I. Mr.Thakur had lodged his complaint with P.S.O. of Panthavada Police Station. P.S.O. had investigated the complaint lodged by Mr.Thakur. During the course of investigation, seized muddamal was sent to Forensic Science Laboratory for analysis. The report of the analyst indicated that the substance analysed was opium. On the conclusion of investigation, the respondent was chargesheeted of the offences punishable under Sections 17 and 18 of the Act in the Court of learned Judicial Magistrate, First Class,

Dhanera. As the offences punishable under the Act are triable by a Special Court, the case was committed to Special Court, Banaskantha at Palanpur for trial, where it was numbered as Sessions Case No.18 of 1988.

3. The learned Additional Sessions Judge, to whom the case was made over for trial, had framed charge against the respondent at Exh.3 of the offence punishable under Section 17 of the Act. The charge was read over and explained to the respondent who had pleaded not guilty to the same and claimed to be tried. The prosecution had, therefore, examined (1) Babuji Khemaji Mali, PW.1 at Exh.6, (2) Gokal Raghnath, PW.2 at Exh.7, (3) P.S.I. Tukaram Johru Thakur, PW.3 at Exh.8, (4) police constable Abadkhan Gulabkhan, PW.4 at Exh.13, (5) writer head constable Arjunsing Balusing, PW.5 at Exh.15, (6) head constable Anvarkhan Akbarkhan Ghasura, PW.6 at Exh.17, (7) head constable Pratapsing Malubha, PW.7 at Exh.20, (8) police constable Janakkumar Girdharlal, PW.8 at Exh.23, and (9) unarmed head constable Bhavansing Dolaji, PW.9 at Exh.24, to prove its case against the respondent. The prosecution had also produced documentary evidence, such as letter written by P.S.I., Pathavada to officer incharge of Police Station at Exh.9, complaint lodged by Mr.Thakur at Exh.10, panchnama of seizure of contraband item at Exh.11, report of Forensic Science Laboratory at Exh.22 etc. in support of its case against the respondent.

4. After recording of evidence of witnesses was over, the learned Judge had explained to the respondent circumstances appearing against him in the evidence of prosecution witnesses and recorded his further statement as required by Section 313 of the Code of Criminal Procedure, 1973. In his further statement, case of the respondent was that he was innocent. However, the respondent had not examined any one as defence witness.

5. On appreciation of evidence, the learned Judge noticed that it was specific case of the prosecution that the respondent was travelling in a trolley attached to tractor, whereas evidence of witness Babuji Khemaji, who was owner of the tractor and was travelling in the tractor, indicated that no trolley was attached to the tractor and, therefore, the prosecution case that the respondent was travelling in the trolley attached to the tractor and that from his possession contraband item was found, was suspicious. According to the learned Judge, evidence of Babuji Khemaji Mali and that of Gokal Raghnath indicated that the person apprehended by P.S.I. Mr.Thakur was introduced to those witnesses as having

name of Jivabhai, but, subsequently the record was tampered with by overwriting and name of the respondent was mentioned, regarding which no explanation worth the name was offered by any of the prosecution witnesses and, therefore, it was not safe to believe the prosecution case. What was noticed by the learned Judge was that though P.S.I. Mr.Thakur, accompanied by other police officials, had maintained watch for about 1 1/2 hour, he had failed to summon panch witnesses and utilized services of Babubhai, who was owner of the tractor, as a panch witness in the case without taking any steps against him, which was unusual and, therefore, the prosecution case against the respondent was not free from doubt. According to the learned Judge, P.S.I. Mr.Thakur could not offer any plausible explanation as to how seal of Panthavada Police Station, which was in possession of Incharge P.S.I. of Police Station, was used by him for the purpose of sealing the contraband item and, therefore, claim of Mr.Thakur that during patrolling an information was received and tractor was intercepted, was not trustworthy. In view of abovereferredto findings, the learned Judge has acquitted the respondent of the offence punishable under Section 17 of the Act by judgment dated August 23, 1991, giving rise to instant appeal.

6. Mr.B.D.Desai, learned Additional Public Prosecutor, contended that the case of the prosecution stands amply established against the respondent by cogent and convincing evidence of P.S.I. Mr.Thakur, which in turn is corroborated by evidence of police officials who were on duty with him at the relevant time and, therefore, the learned Judge was not justified in acquitting the accused of the offence punishable under Section 17 of the Act. According to the learned Additional Public Prosecutor, the learned Judge was not justified in raising doubt about identity of the accused when the respondent was identified in the court-room by the prosecution witnesses and, therefore, the impugned judgment should be reversed. What was maintained by the learned Additional Public Prosecutor was that the learned Judge has given much importance to minor omissions and contradictions appearing in the evidence of prosecution witnesses, which is against well settled principles of appreciation of evidence and, therefore, the appeal should be accepted. The learned counsel contended that evidence on record establishes that the respondent had possessed opium without pass or permit and committed offence punishable under Section 17 of the Act, as a result of which the appeal should be allowed.

7. Mr.A.N.Patel, learned counsel of the respondent, pleaded that the grounds of acquittal recorded by the learned Judge are borne out from the evidence on record and as the learned Additional Public Prosecutor has failed to dislodge them, the appeal should be dismissed. According to the learned counsel of the respondent, there is serious doubt about identity of the respondent as person who was allegedly found in possession of opium and when two views of the matter are possible, this Court should not interfere with the same while exercising powers under Section 378 of the Code. It was argued that the evidence on record has been correctly appreciated by the learned Judge before recording acquittal of the respondent and, therefore, the judgment impugned should be confirmed.

8. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case. The substantive evidence of P.S.I. Mr.Thakur before Court would indicate that a person attired in rajasthani dress was travelling in trolley bearing registration No.GAE-9590 which was attached to a tractor. Mr.Thakur in his substantive evidence has not stated registration number of the tractor. However, the complaint filed by him which is at Exh.10 would indicate that registration number of tractor was GAE-7098. In the complaint, Mr.Thakur has not mentioned that a person attired in rajasthani dress was travelling in a trolley which was attached to the tractor and has stated that the said person was travelling in tractor bearing registration No.GAE-7098. However, panchnama indicates that registration number of trolley was GAE-8590. Babuji Khemaji, who is owner of tractor bearing registration No.GAE-7098 and who was also travelling in the tractor, has in terms stated that no trolley was attached to his tractor. What is relevant is that original panchnama indicates that registration number of trolley was mentioned as GAE-7698 which was subsequently changed to GAE-9590 by overwriting, and before making overwriting, no signatures of panch witnesses were obtained. This overwriting is not explained by the prosecution at all. Under the circumstances, a serious doubt arises as to whether the respondent was in fact travelling in trolley as alleged by the prosecution. Further, Babuji Khemaji Mali, who has acted as one of the panch witnesses, has stated that he is owner of tractor bearing registration No.GAE-7098 and though according to the prosecution, the respondent was found to be in possession of opium without pass or permit, no inquiry was made with Babuji Khemaji

as to whether he was involved in the incident or not, and on the contrary he was cited as one of the panch witnesses, which creates a serious doubt about the prosecution case. Witness Babuji Khemaji and witness Gokal Raghnath have maintained before Court that in their presence nothing incriminating was found either from the person of the respondent or from the bag carried by him and that P.S.I. Mr.Thakur had informed them that the name of the person arrested was Jivaji. Moreover, in Para 13 of the impunged judgment, the learned Judge has observed that copies of police papers which were forwarded to the Court indicated that on interrogation, name of person carrying cloth-bag was learnt to be Barot Jivaji Adaji of village Satsan and word "Jivaji" was overwritten and name of Barot Devaji Adaji was mentioned. This finding is neither challenged before this Court nor demonstrated to be factually incorrect. This overwriting is also not explained by any of the prosecution witnesses, which raises a serious doubt about the identity of the respondent as the same person from whose possession the contraband item was allegedly found. Further, P.S.I. Mr.Thakur could not offer any explanation as to how he had come in possession of seal of Panthavada Police Station. The evidence on record establishes that P.S.I. Mr.Thakur was not incharge P.S.I. of Panthavada Police Station and the evidence further shows that seal of Panthavada Police Station used to be in custody of incharge P.S.I. It is not the case of P.S.I. Mr.Thakur that after find of contraband item from possession of the respondent, he had deputed one of the police officials accompanying him to bring seal. Thus, use of the seal raises a serious doubt as to whether tractor was stopped on the road and whether opium was found from possession of the respondent. The record does not show that either cloth-bag which contained bag of urea fertilizer was attached and/or seized during the course of investigation, nor does it show that even urea fertilizer bag was attached in support of case pleaded in the complaint. The evidence does not show that the sample was properly sealed as required by law and the report of Forensic Science Laboratory would indicate that the slip containing signatures of panch witnesses was kept loose. This sealing procedure does not rule out possibility of tampering with and/or substitution of seized muddamal. The above discussion would indicate that the prosecution has failed to prove the charge levelled against the respondent satisfactorily.

9. This is an acquittal appeal in which Court would be slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the

matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the order of acquittal, more particularly when the evidence has not inspired confidence of the learned Judge who had opportunity to observe demeanour of the witnesses. As this Court is in general agreement with the view expressed by the learned Judge, this Court does not think it necessary either to reiterate the evidence of prosecution witnesses or to restate the reasons for acquittal given by the learned Judge and expression of general agreement with the view taken by the learned Judge would be sufficient in the facts of the case. This is so, in view of the decisions rendered by the Supreme Court in the cases of (1) Girija Nandini Devi & ors. v. Bijendra Narain Chaudhar, A.I.R. 1967 S.C. 1124, and (2) State of Karnataka v. Hema Reddy and another, A.I.R. 1981 S.C. 1417. On overall appreciation of evidence, this Court is satisfied that there is no infirmity in the reasons assigned by the learned Judge for acquitting the respondent. Suffice it to say that the learned Judge has given cogent and convincing reasons for acquitting the respondent. The learned Additional Public Prosecutor has failed to convince this Court to take the view contrary to the one already taken by the learned Judge and, therefore, the appeal is liable to be dismissed.

For the foregoing reasons, the appeal fails and is dismissed. Muddamal to be disposed of in terms of directions given by the learned Judge in the judgment which is impugned in the appeal. The bond, if any, executed by the respondent or his surety shall stand cancelled.

(J.M.Panchal,J.) (M.H.Kadri,J.)